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Supreme Court, U.S.
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No. 97-1458

IN THE
Supreme Court of the United States
October Term, 1997

EASTERN NATURAL GAS CORP.,
and DEST EXPLORATION, INC.,
Petitioners,

v.

ALUMINUM COMPANY OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari filed by Eastern Natural Gas Corp. and Dest Exploration, Inc. (referred to hereinafter together as "ENG") urged, among other things, that:

> The Court should grant this Petition to resolve the question of whether the failure to renew a motion for judgment as a matter of law at the close of all the evidence may be excused where there has been substantial compliance with FED. R. CIV. P. 50 and the purposes of the rule have been met.

Petition at 9. The Brief for Respondent in Opposition raises only one point which is new and not adequately addressed in the Petition. Respondent, Aluminum Company of America ("Alcoa"), contends that ENG has waived its argument that it substantially complied with Rule 50 because ENG "conceded at oral argument that *Umpleby* [*Umpleby v. Potter & Brumfield, Inc.*, 69 F.3d 209 (7th Cir. 1995)] was controlling authority." Brief in Opposition at 9-10. Alcoa asserts that "in contradiction of its position at oral argument below, ENG urges, for the first time ever, that it 'substantially complied' with Rule 50(b) . . ." Brief in Opposition at 9-10.

Contrary to the assertions of Alcoa, ENG has not abandoned its Rule 50 arguments, it has not waived its claim that it is entitled to judgment on the Alcoa counterclaim as a matter of law, and ENG has not waived its right to claim that the Seventh Circuit's decision in this case (which relied upon *Umpleby*) should be overruled.

During oral argument to the court of appeals, counsel for ENG brought up the decision of the court in *Umpleby* in order to comply with his duty to be candid with the court. Rule 3.3 of the MODEL RULES OF PROFESSIONAL CONDUCT provides that:

> (a) A lawyer shall not knowingly:
>
> . . .
>
> (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel
>
> . . . .

The implications of the Seventh Circuit's decision in *Umpleby* were not addressed in the briefs of the parties before oral argument because Alcoa had not claimed that ENG had failed to comply with Rule 50, and counsel for ENG was unaware of *Umpleby* until just prior to the oral argument.

A transcript of that part of the oral argument of counsel for ENG which addressed *Umpleby* (at the very beginning of the arguments of the parities) has been prepared by counsel and the transcription appears as Appendix I to this Reply.[1] As can be seen from that transcript, counsel for ENG did concede that *Umpleby* was controlling adverse authority, but counsel went on to point out to the court how unjust the application of *Umpleby* to this case would be. The Rule 50 motion on the Alcoa counterclaim was made at the close of

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[1] The Seventh Circuit does not provide official transcripts of oral argument, but instead provides audio tapes of the argument, which can be made available, as a part of the record, as necessary.

Alcoa's case. Counsel pointed out to the court of appeals that the only "rebuttal" evidence was the reading of deposition excerpts which were read at the close of Alcoa's case, rather than during Alcoa's case (when Alcoa first introduced the depositions), as an accommodation to the court and the parties. Counsel for ENG pointed out during the argument that the evidence was closed and the case ended within a very short period of time after the Rule 50 motion was made. Appendix I at A73-74. Moreover, counsel argued to the court of appeals that, with Alcoa so clearly unable to prove its fraud counterclaim, the grant of a new trial, rather than a judgment as a matter of law, would be a "shame," because Alcoa's evidence was so lacking in support for its claim as to warrant the grant of summary judgment before any new trial or the grant of another Rule 50 motion at the close of the evidence after any new trial. Appendix I at A 74.

In its Petition for Rehearing to the Seventh Circuit, ENG again argued that *Umpleby* should not bar consideration of ENG's Rule 50 motion on the Alcoa counterclaim, and ENG pointed out that Alcoa itself had waived any claim that ENG failed to properly renew its Rule 50 motion because Alcoa had failed to raise the issue with the trial court or with the court of appeals. Petition for Certiorari at Appendix C, A23.

The compliance of counsel to ENG with his ethical responsibilities to point out adverse authority should not be taken in this case as a waiver of the argument that the authority should be overruled. ENG urged during oral argument to the court of appeals that it did substantially comply with Rule 50. Moreover, ENG did not expressly or by implication abandon its argument that it was entitled to judgment as a matter of law on the fraud counterclaim. ENG asserted in oral argument, as it did in its briefs to the court of

appeals, that Alcoa had no proof of reliance or damages with respect to its fraud counterclaim. Appendix I at A74. In the majority of the Circuits the trial court's denial of ENG's motion for judgment as a matter of law would have been reviewed.

The Petition for Writ of Certiorari should be granted for the reasons advanced by ENG in the Petition.

Respectfully submitted:

/s/_____
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APPENDIX

APPENDIX I

Excerpt from Oral Argument in the Court of Appeals for the Seventh Circuit

Eastern Natural Gas Corp. and Dest Exploration, Inc.
v.
Aluminum Company of America

No. 96-4117, Argued May 22, 1997

. . . .

Your honors, this is a wonderfully rich contracts case, breach of contracts case. It should not have been a fraud case.

Before I proceed though, your honors, I need to bring one matter to the Court's attention which is not in the briefs, and which cuts against me. During my preparation for argument in this case, your honors, I became aware of this Court's decision in Umpleby v. Potter, which is a Rule 50 case which says Rule 50 motions must be brought at the end of all of the evidence in the case, pointing out that this Circuit no longer allows exceptions to that rule.

Your honors, I made the Rule 50 motion on the fraud counterclaim at the close of Alcoa's presentation of its evidence. After that time, Plaintiff read certain excerpts of depositions into the record and thereafter did not make another Rule 50 motion. Your honors, however, the reading

of the excerpts of the depositions at that point, was a matter of convenience to the court and the parties. The depositions . . . were sections that were read were the same depositions which Alcoa had read as a part of its case in chief. At the time Alcoa proposed reading of the depositions, I brought to the court's atten . . . I asked counsel for Alcoa whether she was also going to read the parts of the deposition, the depositions that I had designated. In other words, both parties had already said these depositions, these are the parts of the depositions we will put into evidence. She said "no" and the court said under Federal Rule of Evidence 103, "well, you are entitled to read those; you can read those after she reads her part."

At that point I said "well, your honor there are two ways that we can do this: we can read them now, or we can read them as part of the rebuttal, and maybe I can shorten them up as part of the rebuttal. And that's that's what happened, but I did not make a Rule 50 motion at the close of all the evidence in the case, only at the close of Alcoa's case. The case ended roughly 45 minutes or an hour after I made my Rule 50 motion.

Your honors, I did make an alternative motion for a new trial, but it seems a shame to retry the issue of the fraud claim on the evidence that was presented, to raise the issues of whether I can file a summary judgment motion before the new trial, or file another Rule 50 motion at the close of the evidence in the new trial. Your honor, the only evidence of reliance or damages on the fraud claim was that Alcoa might have abandoned the project. Quoting from Alcoa's counsel in argument opposing the Rule 50 motion: "They were considering that, that was definitely a possibility. Larry Corwin and ENG kept this thing alive. Had they been honest about it, this thing might have died back in 1988 and Alcoa

would have saved all that money instead of pursuing a lot of dry holes."

"Definitely a possibilities" [sic] your honor is not proof of reliance or damages. Your honors, unless there are further questions on the fraud claim, I think it has been adequately dealt with in the briefs.

. . . .

I certify that the foregoing is a correctly transcribed excerpt from the record of the Oral Argument in the Court of Appeals for the Seventh Circuit in the matter of Eastern Natural Gas Corp. and Dest Exploration, Inc. v. Aluminum Company of America, No. 96-4117, argued May 22, 1997.

/S/
D. Duane Cook
Counsel of Record